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SUPREME COURT, U.S.

No. 05-1593

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY L. ATES

Petitioner,

vs.

JAMES R. MCDONOUGH, etc.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED (restated)

Whether, under 28 U.S.C. §2244(d)(2), a state prisoner is entitled to tolling of the one-year limitation period during the time that a petition for writ of certiorari could have been filed following completion of collateral proceedings in the state court?

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OPINION BELOW

Petitioner, Jimmy L. Ates, seeks review of the January 10, 2006, order of the United States Court of Appeals for the Eleventh Circuit denying his request for a certificate of appealability. Rehearing was denied February 21, 2006.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. §1254(1), of a unpublished decision of the Eleventh Circuit filed on January 12, 2006, which denied a certificate of appealability. This Court has jurisdiction.

In order to obtain review under 28 U.S.C. §1254(1), Petitioner must show that the Eleventh Circuit was presented and passed on the questions raised in his petition. Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 140 L.Ed.2d 551 (1998),

City of Springfield v. Kibbe, 480 U.S. 257, 107 S.Ct. 114, 94 L.Ed.2d 293 (1987).

In his request for a certificate of appealability to the Eleventh Circuit he argued that the timeliness ruling was wrong . The Eleventh Circuit denied a certificate of appealability. In doing so, the Eleventh Circuit stated,

> Although the appellant alleges that the limitations period should be tolled during the period in which he could have sought certiorari review from the U.S. Supreme Court regarding the denial of his state post-conviction motion, this Court has expressly rejected that argument. See Lawrence v. Florida, 421 F.3d 1221, 1225 (11th Cir. 2005).

The Court then went on to hold that the Petitioner had failed to meet the second prong of the test set out in Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1596, 1600-01, 146 L.Ed.2d 542 (2000), namely that reasonable jurists would find debatable the procedural issue the Petitioner sought to raise. (Opinion, Appendix two, Petitioner's brief).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the statutory provision implicated in this case.

STATEMENT OF THE CASE AND FACTS

On September 23, 1998, a state court jury found the Petitioner guilty of first degree murder. The Petitioner was sentenced to life. The Florida First District Court of Appeal affirmed the judgment and sentence *per curiam* without an opinion, on July 31, 2000. See Ates v. State, 768 So.2d 446 (Fla. 1st DCA 2000). The mandate issued on August 16, 2000. Subsequently the Petitioner filed a motion for postconviction relief pursuant to

Florida Rule of Criminal Procedure 3.850 on July 31, 2001. The state trial court denied the motion. The Florida First District Court of Appeal affirmed the denial of the motion *per curiam* without an opinion, with the mandate issuing on November 8, 2004.

The Petitioner then filed a federal habeas petition pursuant to 28 U.S.C. §2254 on February 22, 2005. The Respondent moved to dismiss the petition on the ground that it was untimely under 28 U.S.C. §2244(d), and alleged that a total of 380 untolled days expired from the date the direct appeal judgment became final by the expiration of the time to file a petition with this court and the filing of the petitioner's petition for writ of habeas corpus. The magistrate agreed, and recommended in his Report and Recommendation that the petition be dismissed (Doc 21). The Federal District Court Judge adopted the report and recommendation (Doc 22).

The Petitioner then sought a Certificate of Appealability from the Eleventh Circuit Court of Appeals. In his request for a certificate of appealability, he asserted that reasonable jurists would find debatable whether he was entitled to statutory tolling during the 90 day period for seeking certiorari from the denial of his state postconviction motion and that reasonable jurists would find debatable several issues concerning the merits of his habeas petition.

The Court of Appeals denied the motion. In so doing, the Court stated,

> Although appellant alleges that the limitations period should be tolled during the period in which he could have sought certiorari review from the U.S. Supreme Court regarding the denial of his state post-conviction motion, this Court has expressly rejected that argument. See Lawrence v. Florida, 421 F.3d 1221, 1225 (11th Cir. 2005).

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues he seeks to raise. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because his petition is plainly barred by § 2254's one-year statute of limitations, and he is not entitled to statutory or equitable tolling, appellant has failed to satisfy the second prong of Slack's test. (Pet. Apx. A-3)

REASONS FOR DENYING THE WRIT

The time in which certiorari can be sought from the denial of state postconviction relief is not subject to tolling under §2244(d)(2), which exists for the purpose of permitting exhaustion of state court remedies. The statutory language is clear, and there is no reason why this Court should grant the petition merely to restate that which is set out in the statute.

In this petition for a writ of certiorari, the Petitioner contends that this Court should grant review of the unpublished decision of the Eleventh Circuit denying a certificate of appealability as the decision resolved an important question of federal constitutional law. The Respondent disagrees and urges this Court to deny review.

Petitioner contends that this Court should grant certiorari review on the issue of whether the time during which a petitioner could seek a writ of certiorari from a state collateral proceeding is included under 28 U.S.C. §2244(d)(2), relying on the decision of the Sixth Circuit Court of Appeals in Abela v. Martin, 348 F.3d 164 (6th Cir. 2003), *cert. denied*, 541 U.S. 1070 (2004).

The starting point for certiorari analysis is United States Supreme Court Rule Ten, which provides that certiorari will be granted only for compelling reasons. The fact that one circuit in one case misinterpreted this Court's holdings in Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002), and Duncan v. Walker, 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001), is not a basis to grant certiorari when the facts are significantly different.

Pursuant to §2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is

pending shall not be counted toward any period of limitation under this subsection." In Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002), this Court held that "an application is pending as long as the ordinary *state collateral review process* is 'in continuance'--i.e., 'until the completion of' that process. In other words, until the application has achieved final resolution *through the State's post-conviction procedures*, by definition it remains 'pending.'" Id. at 219-220, 122 S.Ct. at 2138 (emphasis added). Tolling under §2244(d)(2) serves the purpose of permitting a state prisoner to exhaust his state court remedies, a requirement under §2254(b). Exhaustion does not, however, require that a state prisoner seek discretionary review from this Court. In comparison, relative to the direct appeal of the judgment of a conviction and sentence, the time that a petition for certiorari is pending or the ninety-day period for seeking such review is relevant under §2244(d), because under the unique language of that section, (expiration of the time for seeking such review) it determines when a conviction or a sentence, or both, become final. Caspari v. Bohlen, 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236(1994). Section 2244(d) on the other hand tolls while state post conviction actions are pending. Petitioner did not seek certiorari and had nothing pending so as to activate any tolling provision.

The Eleventh Circuit's case law is consistent with those principles, Coates v. Byrd, 211 F.3d 1225, 1227, as are nearly all of the other circuit courts of appeals. See, e.g., Stokes v. District Attorney of Philadelphia, 247 F.3d 539, 542 (3rd Cir.), cert. denied, 534 U.S. 959 (2001); Crawley v. Catoe, 257 F.3d 395, 398-401 (4th Cir. 2001), cert. denied, 534 U.S. 1080 (2002); Ott v. Johnson, 192 F.3d 510, 512-513 (5th Cir. 1999), cert. denied, 529 U.S. 1099 (2000); Gutierrez v. Schomig, 233 F.3d 490, 491-492 (7th Cir. 2000), cert. denied, 532 U.S. 950 (2001); Snow v. Ault, 238 F.3d 1033, 1035-1036 (8th Cir.), cert. denied, 532 U.S. 998 (2001); Rhine v. Boone, 182 F.3d 1153, 1155-1156 (10th Cir. 1999), cert. denied, 528 U.S. 1084 (2000). The fact that the Sixth Circuit reached a different result, *compare* Abela, 348 F.3d at 172-173, does not provide a basis for granting certiorari review in this case.

Additionally, petitioner does not present a case where he had anything pending after the denial of state post conviction relief, thus under Carey v. Saffold, 536 U.S. 214 (2002), there is no basis for granting relief.

The conclusion reached by the vast majority of appellate courts is mandated by the plain statutory language in 28 U.S.C. §2244(d). A comparison of the language contained in Section 2244(d)(1) and §2244(d)(2) shows distinct differences. §2244(d)(1)(a) provides,

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review

By contrast, §2244(d)(2) provides

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In Duncan v. Walker, 533 U.S. 167, 121 S Ct. 2120, 150 LEd.2d 251 (2001), this Court held that a federal petition for writ of habeas corpus did not toll the 1-year period set out in Section 2244(d)(1), because it was not a "pending" "state" post-conviction proceeding. This Court noted that one must begin with the statute's language. 533 U.S. at 172, 121 S.Ct. at 2124. This Court further observed, "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" 533 U.S. 167, 174.. This Court then said,

> Respondent reads § 2244(d)(2) to apply the word "State" only to the term "post-conviction" and not to the phrase "other collateral." Under this view, a properly filed federal habeas petition tolls the limitation period. Petitioner contends that the word "State" applies to the entire phrase "post-conviction or other collateral review." Under this view, a properly filed federal habeas petition does not toll the limitation period.
>
> We believe that petitioner's interpretation of § 2244(d)(2) is correct for several reasons. To begin with, Congress placed the word "State" before "post-conviction or other collateral review" without specifically naming any kind of "Federal" review. The essence of respondent's position is that Congress used the phrase "other collateral review" to incorporate federal habeas petitions into the class of applications for review that toll the limitation period. But a comparison of the text of § 2244(d)(2) with the language of other AEDPA provisions supplies strong evidence that, had Congress intended to include federal habeas petitions within the scope of § 2244(d)(2), Congress would have mentioned "Federal" review expressly. In several other portions of AEDPA, Congress specifically used both the words "State" and "Federal" to denote state and federal proceedings.

Finally, this Court said,

> "Section 2244(d)(2), by contrast, employs the word "State," but not the word "Federal," as a modifier for "review." It is well settled that 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts

> intentionally and purposely in the disparate inclusion or exclusion.'" 533 U.S. 167, 173, 121 S. Ct. 2120, 2125.

In Rhine v. Boone, 182 F.3d 1153, 1156 (10th Cir. 1999), the Tenth Circuit Court of Appeals applied similar reasoning to conclude that congress never intended that the 90-day period to seek certiorari in this court should apply from state postconviction proceedings to toll the 1-year limitations period. There, the court said,

> The state post-conviction proceeding is final after the state's highest court has addressed the application. Exhaustion of state remedies, which is a pre-condition to the ability to petition for a writ of habeas corpus, does not include a direct appeal to the United States Supreme Court from the state's denial of post-conviction relief, and neither is a federal court's jurisdiction to entertain a habeas petition affected by whether or not review of the state's denial of post-conviction relief is sought in the Supreme Court. [Citations omitted] The tolling provision specifically refers to a properly filed application for "State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). We are satisfied that, in the wording of § 2244(d)(2), "State" modifies the phrase "post-conviction review" and the phrase "other collateral review." A petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither an application for state post-conviction review nor an application for other state collateral review.

The Eleventh Circuit Court of Appeals specifically adopted this reasoning in Coates v. Byrd, 211 F.3d 1225, 1226-1227 (11th Cir. 2000), the holding of which was reiterated in Lawrence v. Florida,

421 F.3d 122[illegible], 1225 (11th Cir. 2005), which is now pending review before this Court.

It is significant to observe that in Abela v. Martin, *supra*., p. 5, and Lawrence the defendant actually filed a petition for writ of certiorari with this Court to review the denial of his state post-conviction proceeding. In this case, the petitioner did not file with this Court for review. Thus, while it is conceivable to argue that in Abela and Lawrence the defendant at least had *something* pending, albeit nothing in the state courts, in this case the petitioner had **nothing** pending during the 90-day period. Therefore there is no basis upon which he can reasonably expect to be given the benefit of an additional 90 days that it is clear Congress never intended.

These holdings are the logical extension of the rule expressed in Duncan v. Walker, *supra*. In §2244(d)(1), the statute talks in terms of when a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review. This contemplates **all** review, including the potential for review by this Court. However, §2244(d)(2) does not mention finality or the time for seeking review. Rather, it talks solely in terms of the time during which a "state" post-conviction proceeding is "pending." Consistent with the reasoning in Walker, if Congress had intended to include the 90-day period for seeking review in this Court after the ultimate denial of a state post-conviction proceeding, then Congress would have said so. Either it would have used language similar to that used in §2244(d)(1), or it would have expressly including the certiorari time period. It did neither. Instead, Congress specifically limited the tolling procedures to be those involved in the **state** court post-conviction proceedings. Obviously seeking certiorari review in this Court is not a **state** post-conviction proceeding. For this Court to rule otherwise, this Court would have to recede from its holding in Walker; and, since Walker is grounded on sound logic, this Court should maintain its integrity.

The majority of the appellate courts have interpreted the statute correctly. Only state court proceedings toll the 1-year

limitations period. Seeking review in this Court is not a state court proceeding, so it does not toll the 1-year limitations period under §2244(d)(2). For that reason, the court below correctly ruled that a certificate of appealability should not issue. Because the Eleventh Circuit facts in this case differ from those in Abela and Lawrence, this Court should deny the petition.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully Submitted,

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